Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of **AT&T CORP.** ***Complainant,*** ***v.*** **IOWA NETWORK SERVICES, INC.** ***Defendant.***	**Proceeding Number 17-56** **File No. EB-17-MD-001**

REPLY OF AT&T CORP. IN SUPPORT OF PETITION FOR FURTHER RECONSIDERATION

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Pursuant to 47 C.F.R. § 1.106, AT&T Corp. ("AT&T") hereby submits this reply in support of its Petition for Further Reconsideration of the Commission's August 1, 2018 Order on Reconsideration ("*Reconsideration Order*")[1] of the Commission's Memorandum Opinion and Order, dated November 8, 2017 ("*Liability Order*").[2] As explained in greater detail below, none of the arguments presented by Iowa Network Services, Inc. d/b/a Aureon Network Services ("Aureon") in its opposition have any merit.

ARGUMENT

In its Petition, AT&T explained that, for several reasons, it was unlawful and erroneous for the Commission to reverse itself in the *Reconsideration Order*, and to determine that Aureon's 2012 tariffed rate "remains in effect" until 2018, unless AT&T can show that Aureon engaged in furtive concealment by failing to disclose improper accounting methods. *Id.* ¶¶ 16-18.

- *First*, when (as here) a carrier files an unreasonable rate in a tariff that is not deemed lawful, *see Liability Order*, ¶¶ 23-30, 35; *Reconsideration Order*, ¶¶ 11-15, the Act requires the Commission to award the customer the "full amount of damages" (47 U.S.C. § 206), which means (at a minimum) that the Commission must determine what Aureon's tariffed rates should have been from mid-2013 to 2018; by relying on (without further examination) the 2012 rate to limit Aureon's liability, the Commission violated the Act and ignored its own precedents. Pet. at 8-13.
- *Second*, beginning July 1, 2013, Aureon's tariffed rate could not be higher than the CLEC benchmark rate. *Liability Order*, ¶ 24; 47 C.F.R. § 51.911(c); *id.* § 61.26. Any rate above that benchmark is subject to mandatory detariffing, and neither Aureon nor the Commission has the statutory authority to enforce an above-benchmark tariffed rate. In its *Rate Order*,[3] the Commission determined that the CLEC benchmark rate, at least as of

[1] Order on Reconsideration, *AT&T Corp. v. Iowa Network Servs., Inc., d/b/a Aureon Network Servs.*, FCC 18-116, Proceeding No. 17-56, Bureau ID No. EB-17-MD-001, 2018 WL 3703276 (rel. Aug. 1, 2018) ("*Reconsideration Order*").

[2] Memorandum Opinion and Order, *AT&T Corp. v. Iowa Network Servs., Inc., d/b/a Aureon Network Servs.*, 32 FCC Rcd. 9677 (2017) ("*Liability Order*").

[3] Memorandum Opinion and Order, *In the Matter of Iowa Network Access Division Tariff F.C.C. No. 1*, DA 18-395, WC Docket No. 18-60, 2018 WL 3641034 (rel. July 31, 2018) ("*Rate Order*").

2018, was $0.005634/min., which is lower than Aureon's 2012 rate of $0.00623/min, and thus the 2012 rate could not be the lawful rate after July 1, 2013. Pet. at 13-19.

- *Third*, it was arbitrary for the Commission to rely on the 2012 rate, because it had multiple deficiencies—including that it was based on the same flawed methodologies that the Commission found improper in the *Rate Order*. Nothing in Section 204(a)(3) required the Commission to ignore the multiple defects in the 2012 rate and to enforce it in future periods (from July 1, 2013 to 2018) when Aureon's 2013 tariff was determined to be both unlawful and not deemed lawful. Pet. at 19-22.
- *Fourth*, the Commission acted arbitrarily in assuming that Aureon would not have followed its obligation to refile its 2012 tariff in 2014 and 2016, with rates that complied with the Commission's rules requiring its rates to be the *lower* of the CLEC benchmark rate and the rate as determined under the Commission's cost-of-service rules. Pet. at 23-24.

In its opposition, Aureon fails to respond meaningfully to any of AT&T's arguments. Nor does Aureon offer any legitimate defense of the Commission's rationale for re-instating Aureon's 2012 tariff rate for a five year period.

1. Aureon Offers No Serious Defense of The Commission's Determination That Aureon's 2012 Rate Remained In Effect As of July 2013.

Aureon's only merits argument (Opp. at 6-8) simply parrots the Commission's rationale in the *Reconsideration Order*—that Aureon's 2012 tariff rate was (contrary to fact) not cancelled and "retained its legal status" (*id.* ¶ 17) until 2018. But AT&T's Petition explains—in great detail and on multiple grounds—why the 2012 rate could not lawfully have retained its legal status as of July 1, 2013. Most notably, beginning on July 1, 2013, Aureon's 2012 tariffed rate exceeded the CLEC benchmark rate and was thus subject to mandatory detariffing.[4] Because of mandatory detariffing, *i.e.*, the Commission's decision to "forbear from the enforcement" of "the Act's tariff requirements" for above-benchmark rates, *Seventh Report and Order*, ¶ 82, the Commission erred

[4] *See* Seventh Report and Order, *In the Matter of Access Charge Reform*, 16 FCC Rcd. 9923, ¶¶ 3, 82-87 (2001) ("*Seventh Report and Order*") ("[W]e exercise our statutory authority to forbear from the enforcement of our tariff rules and the Act's tariff requirements for CLEC access services priced above our benchmark."); *see also* Brief for Amicus Curiae FCC, *Paetec Commc'ns v. MCI Commc'ns*, Nos. 11-2268 & 11-1204, 2012 WL 992658, at *25-26 (3d Cir. Mar. 14, 2012) ("FCC PaeTec Brief").

by concluding that the 2012 rate had any "legal status" (*Reconsideration Order*, ¶ 17) as of July 1, 2013. Aureon's opposition also fails to point to any valid legal authority, as of July 1, 2013, that would permit it or the Commission to enforce an above-benchmark rate like Aureon's 2012 tariffed rate.

Like the Commission, Aureon's defense of paragraphs 16 to 18 of the *Reconsideration Order* relies on the counterfactual proposition that the 2012 tariff "was on file with the Commission and effective between July 3, 2012 and February, 28, 2018" and remained "deemed lawful" during that time. Opp. at 7-8; *see Reconsideration Order*, ¶ 17. In so contending, Aureon inaccurately seeks to re-write history. Aureon's 2012 tariff was *not* effective or "on file" with the Commission between July 1, 2013 and 2018. Instead, the indisputable facts are that Aureon re-filed its tariff in 2013, in 2014, and in 2016,[5] billed AT&T and other carriers for services pursuant to those tariffs and, as the Commission determined and re-affirmed on reconsideration, each of those tariffs as amended contained an unjust and unreasonable rate that exceeded the Commission's rate caps. *Liability Order*, ¶¶ 30, 35; *Reconsideration Order*, ¶ 5. Consequently, none of the tariffs Aureon actually had on file from July 1, 2013 to 2018 were deemed lawful. *Liability Order*, ¶ 29; *Reconsideration Order*, ¶¶ 11-15; *see* AT&T Pet. at 24-25 (explaining that Aureon's 2013 tariff rate also was not deemed lawful because it exceeded the benchmark rate and was subject to mandatory detariffing).

Because the rate in the 2012 tariff was not "on file" or effective beginning July 1, 2013—and, indeed, could not have lawfully been on file as a result of mandatory detariffing (47 C.F.R. §§ 51.911(c), 61.26)—and the tariffs that were on file were not deemed lawful, the Commission

[5] AT&T Ex. 20 (Aureon 2013 Tariff Filing); AT&T Ex. 21 (Aureon 2014 Tariff Filing); AT&T Ex. 22 (Aureon 2016 Tariff Filing).

should have re-affirmed its holding in the *Liability Order* that it would conduct a detailed review and determine in a subsequent damages proceeding what Aureon's rates should have been. *Id.* ¶ 35. Under that holding, damages would be awarded by applying the Commission's existing precedents that the "proper measure of the damages" is (at a minimum) "the difference between the unlawful rate" and what the "just and reasonable rate" should have been.[6]

Aureon (like the Commission) attempts to justify its position that the 2012 rate should be considered as "on file" from 2013 to 2018 by relying on the Commission's determination that the 2013 tariff was "void *ab initio*." Opp. at 7; *Reconsideration Order*, ¶ 17. However, the holding that the 2013 tariff was "void *ab initio*" and thus "null from the beginning," *id.*, ¶ 17 & n.53, does not at all support the conclusion that, in this "but-for" world, the 2012 rate would have remained in effect for nearly five years, until 2018. As AT&T explained, this view is not supported by any precedents, and would lead to perverse results in this case and in the many other cases in which the Commission has set declining rate caps. Pet. at 11-13.

Further, the hypothesis that the 2012 tariff, contrary to fact, would have remained in effect until 2018 is especially wrong in light of the Commission's conclusion in the *Liability Order*—which it re-affirmed in the *Rate Order*—that in this period, Aureon "may only tariff a rate at the *lower of* the benchmark rate or cost-based rate." *Rate Order*, ¶ 115 (emphasis in original); *Liability Order*, ¶ 26. In addition, it cannot be reconciled with the Commission's earlier determination in the *Reconsideration Order* that "once the Commission determined in 2011 that Aureon … was

[6] *New Valley Corp. v. Pac. Bell*, 15 FCC Rcd. 5128, ¶ 12 & n.27-28 (2000); *see also Section 208 Complaints Alleging Violations of the Commission's Rate of Return Prescription for the 1987-1988 Monitoring Period*, 8 FCC Rcd. 1876, 1880 (1993); *Reiter v. Cooper*, 507 U.S. 258, 262-63 (1993). As noted in its Petition, AT&T fully reserves its rights to argue that the Commission's damages precedents should be altered in the circumstances here: from 2013 to 2018, Aureon lacked a valid tariff or a negotiated contract and thus had no valid legal authority to collect any charges from AT&T. Pet. at 9 n.22.

subject to the rate caps, the Commission was obligated to enforce them" and carriers, like Aureon, were "bound to conform." *Reconsideration Order*, ¶ 13. Neither Aureon nor the Commission offer any reason justifying the assumption that, in their "but-for" world (in which the 2013 tariff was never actually filed), Aureon would have been allowed, for a period of five years (from mid-2013 to 2018), to leave in place its 2012 tariff—even though the 2012 rate—like the 2013 rate—violated the Commission's rate caps *and* its cost-of-service rules.

Nor does Aureon offer any response to AT&T's showing that the *Reconsideration Order* would create a dangerous precedent that could seriously hinder the Commission's ability to enforce declining rate caps. Pet. at 12-13. Under the rationale of the *Reconsideration Order*, a carrier subject to such rate caps would suffer no harm if it violated the caps after the initial year—indeed, it could benefit: the remedy for the unlawful rate filing would be to reinstate a higher rate. *Id.* Unless the Commission wants to engage in enforcement actions via carrier-specific prescriptions, rather than establishing generally applicable, declining rate caps, it should reverse this aspect of the *Reconsideration Order*.[7]

[7] Aureon also asserts that AT&T will have a "full and fair" opportunity in the damages phase to "demonstrate whether AT&T is entitled to damages under Section 206 for any payments made by AT&T in excess of the $0.00623 deemed lawful rate." Opp. at 6. This mischaracterizes the law and the Commission's holdings. For the reasons AT&T has explained, the 2012 is not deemed lawful beginning on July 1, 2013—which is why the damages phase is not full or fair, because it purports to limit AT&T's liability without conducting the necessary inquiry under the Act and existing precedent. In any event, even if the 2012 rate were deemed lawful, the Commission has also determined that AT&T would be entitled to additional damages to the extent Aureon furtively concealed improper accounting methods. *Reconsideration Order*, ¶ 16.

2. Aureon's Procedural Argument, And Its Argument Premised on Section 415's Limitations Period, Are Baseless.

Aureon first two arguments assert that AT&T's Petition is procedurally flawed, and somehow runs afoul of the limitations period in Section 415. Opp. at 2-5. These arguments have no merit whatsoever, and should be rejected.

First, AT&T's Petition complies with Section 405 of the Act and the Commission's rules. AT&T's Petition demonstrates multiple "material error[s]" in Part III.C of the *Reconsideration Order*, and also raises "additional facts not known or existing until after the petitioner's last opportunity to present such matters." *GM Corp./Hughes Elec. Corp*., 23 FCC Rcd. 3131, ¶ 4 (2008).[8] A central claim in AT&T's Petition is that the 2012 rate exceeds the applicable benchmark rate, the Commission erroneously reversed its determination in the *Liability Order* that it would conduct "a detailed review of Aureon's rates to determine what the appropriate tariff rates should have been" (*Liability Order* ¶ 35) and, without reaching the issue of whether Aureon's 2012 tariff rate violated Rule 51.911(c), it arbitrarily re-imposed the 2012 rate for the period mid-2013 to 2018. In the *Liability Order*, the Commission did not reach that issue "because we do not have an adequate record to determine the pertinent benchmark rate." *Id.* ¶ 24. That situation did not change in the reconsideration proceeding. However, in the *Rate Order,* the Commission found that the current benchmark rate is $0.005634/min., which is lower than the 2012 rate. AT&T could

[8] Aureon's argument is totally disingenuous given that they sought reconsideration, and prevailed at least as it relates to the 2012 rate issue. The idea that Aureon was entitled to reconsideration, but that AT&T would now be barred on procedural grounds from seeking reconsideration of a decision that is directly at odds with the Commission's earlier determination is meritless.

not have relied on the *Rate Order* in its opposition to Aureon's petition, and AT&T's Petition is procedurally proper.[9]

Second, Aureon argues that, AT&T's Petition "challeng[es] the lawfulness of Aureon's 2012 rate," but that AT&T's district court counterclaims did not challenge the 2012 rate, and that, under Section 415, the time to assert claims against the 2012 rate "lapsed altogether no later than July 3, 2014." Opp. at 3-5. This argument is baseless, and completely misses the point. Apart from its claim that Aureon engaged in furtive concealment in filing its 2012 tariff, AT&T has not challenged Aureon's charges under its 2012 tariff.[10] In fact, AT&T fully paid Aureon's charges up until mid-2013.

Rather, AT&T's primary claim in its Petition is that the Commission erred, when it issued its *Reconsideration Order*, and improperly held that the 2012 tariff applied to *future periods* from July 1, 2013 to February 22, 2018. *See Reconsideration Order*, n.56. It is obvious that this claim was made on a timely basis. Surely AT&T was not required to file suit by "July 3, 2014," Opp. at 5, challenging the 2012 tariff on the grounds that, years in the future, the Commission would decide

[9] Further, as a practical matter, AT&T notes that Aureon devoted one of the 25 pages of its reconsideration petition to this issue. The Commission's explanation of its reversal of its *Liability Order* determination occurs in only three paragraphs of the *Reconsideration Order*. Because this aspect of the Commission's *Reconsideration Order* is almost certainly going to be appealed if it is upheld, it is important that the Commission have an opportunity to correct its erroneous ruling based on a complete record. *See* 47 U.S.C. § 405.

[10] As to the furtive concealment claim, to the extent AT&T establishes that Aureon "furtively employed improper accounting practices to conceal" statutory and rule violations, *Reconsideration Order*, ¶ 16, AT&T's claims about the 2012 tariff would be timely under Section 415. Section 415 uses the "discovery of injury" rule, *see Commcn's Vending Corp. v. FCC*, 365 F.3d 1064, 1074 (D.C. Cir. 2004), and thus the limitations period did not begin to run until AT&T had notice of the violation. By "furtively concealing" its accounting violations, Aureon plainly prevented AT&T from discovering those violations until *after* AT&T obtained (under seal) the documentation of Aureon's improper practices—by which time AT&T had already raised its challenges in a timely manner.

that that rate (even though Aureon purported to supersede it on July 1, 2013) must be put back in place from mid-2013 to 2018.

Nor are AT&T's counterclaims deficient or untimely. AT&T's district court counterclaims clearly and expressly challenged the bills and rates that Aureon sent pursuant to its 2013 tariff,[11] and to the extent Aureon were allowed to charge its 2012 rate for periods after July 1, 2013, AT&T's counterclaims are easily broad enough, and were timely filed, to challenge any such charges as unlawful.[12] In fact, if Aureon's bizarre limitations theory were accepted, its own claims would have to be dismissed. Aureon never sued AT&T to collect under its 2012 tariff (as noted, AT&T paid those charges), and Aureon never billed AT&T its 2012 rate in any invoice for traffic exchanged during the period mid-2013 to 2018. If Aureon's view were correct, then Aureon would be barred from either reissuing its bills based on its 2012 rate or seeking to collect pursuant to those bills.

CONCLUSION

For the foregoing reasons, the Commission should grant AT&T's Petition.

[11] *See* Defendant's Answer and Counterclaims, ¶¶ 5, 57, *Iowa Network Services, Inc. v. AT&T Corp.*, No. 14-3439 (JAP-LHG) (D.N.J. Aug. 4, 2014) ("[I]n 2013, INS raised the rates applicable to the primary switched access services it provides by over 40 percent, and to rates above those it had in place at the end of 2011. Because the increase contravenes the FCC's rules, INS's tariff itself violates the FCC's rules, and it should never have been filed containing unlawful and unreasonable rates.").

[12] *See id.* ¶¶ 111-145.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 17, 2018 I caused a copy of the foregoing Reply of AT&T Corp. in Support of Petition for Further Reconsideration to be served as indicated below to the following:

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